

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

BRIAN RICHARDSON, et al	.	Case No. 5:15-cv-06325-WB
	.	
	.	
Plaintiffs,	.	
vs.	.	U.S. Courthouse
	.	601 Market Street
VERDE ENERGY USA, INC.,	.	Philadelphia, PA 19106
	.	
Defendant.	.	September 23, 2019
	.	4:00 p.m.
.	

TRANSCRIPT OF MOTION FOR PRELIMINARY SETTLEMENT
BEFORE THE HONORABLE WENDY BEETLESTONE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs:	Berger Montague PC By: LANE L. VINES, ESQ. 1818 Market Street, Suite 3600 Philadelphia, PA 19103 (215) 875-4658
For the Defendant:	Eckert Seamans Cherin & Mellot LLC By: JOEL LENNEN, ESQ. 600 Grant Street, 44th Floor Pittsburgh, PA 15219 (412) 566-6197

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1 (Proceedings commence at 4 p.m.)

2 THE COURT: Richardson versus Verde Energy USA, Inc.

3 It's the motion for preliminary approval of settlement. So I
4 received the briefs, read the briefs. I'd like you to argue,
5 on the record, as to why you think this is an appropriate
6 settlement, and I'd like to -- you to specifically focus on the
7 adequacy of the relief.

8 MR. VINES: Okay.

9 THE COURT: Go ahead.

10 MR. VINES: Good afternoon, Your Honor. Lane Vines,
11 Berger Montague, for the plaintiffs and the settlement class.
12 May it please the Court, plaintiffs Brian Richardson, Michelle
13 Hunt, Jacqueline Bowser, Chris Villager (phonetic), and Donna
14 Schley have filed a motion for preliminary approval of the
15 class settlement. The motion is unopposed by Defendant, Verde
16 Energy USA, Inc.

17 The plaintiffs have supplied the Court with the
18 settlement agreement along with the proposed preliminary
19 approval order, the notice of settlement claim form and final
20 judgment. In accord with FRCP 23, the plaintiffs seek the
21 Court's preliminary approval of the proposed settlement so that
22 notice can be given to the settlement class. The proposed
23 settlement follows four years of highly contested litigation.
24 The parties reached an agreement to settle this class action
25 for a \$3 million cash payment to the settlement class, subject



1 to the approval of the Court.

2 The proposed settlement will resolve all claims
3 asserted in the action which arise from defendant's alleged
4 violations of the Telephone Consumer Protection Act known as
5 the TCPA. At the time the settlement was reached, plaintiffs
6 were fully informed of the strengths and weaknesses of the
7 claims asserted, and prior to reaching the settlement,
8 plaintiffs obtained significant fact discovery, including
9 document productions and written discovery concerning Verde's
10 business practices and operations, as well as information
11 learned through depositions of Verde and its vendors.

12 Significantly, the parties reached this settlement
13 only after extensive negotiations involving an independent
14 mediator, former Chief Judge Lawrence Stangel, as well as
15 several prior mediation sessions before former Magistrate Judge
16 Diane Welsh. The proposed settlement will benefit a settlement
17 class defined as all individuals in the United States who
18 received a call made by or on behalf of Verde Energy USA, Inc.
19 to the individual's cellular or landline telephone through the
20 use of prerecorded or artificial voice from October 16, 2013,
21 to February 14, 2019.

22 Settlement class totals approximately 366,598
23 persons. Given the projected net settlement fund of \$1,575,000
24 after deducting estimated fees, costs, service awards, as well
25 as administration costs, if and as approved by the Court, the



1 fund would be equally divided among 36,660 authorized
2 claimants. That is assuming a 10 percent claims rate, which is
3 common in TCPA class-action settlements, thus each claimant
4 would receive a distribution of approximately \$43.

5 Here, the settlement provides for a very simple
6 claims process where claim forms can be submitted by website,
7 email, fax, or U.S. mail, and claimants need only sign a form
8 provided to them and need not submit additional documentation.
9 The Third Circuit has long recognized there is a strong
10 presumption in favor of voluntary settlement agreements, and
11 this presumption is especially strong in class actions where
12 substantial judicial resources can be conserved by avoiding
13 formal litigation.

14 Settlement agreements are encouraged because they
15 promote the amicable resolution of disputes and lighten the
16 increasing load of litigation faced by federal courts. In
17 addition, the parties may also gain significantly from avoiding
18 the cost and the risk of a lengthy and complex trial. Here,
19 the proposed settlement will provide a tangible, invaluable
20 recovery to the settlement class members and avoid the
21 uncertainties and expense of continued litigation.

22 Moreover, the value of a settlement is squarely in
23 line with other TCPA settlements. So for all of the reasons
24 set forth in the motion and accompanying papers, the plaintiff
25 respectfully requests that the Court preliminarily approve the



1 proposed settlement and enter the proposed preliminary approval
2 order as filed so that notice of the settlement can be given to
3 the class.

4 To answer Your Honor's question as to the adequacy of
5 relief, as we have calculated a projected net settlement fund,
6 the claim distribution would be squarely in line with a typical
7 TCPA class action.

8 THE COURT: Well, I'm looking at the -- at Landsman &
9 Funk, which is a Third Circuit case.

10 MR. VINES: Uh-huh.

11 THE COURT: In that case, the -- not to say that this
12 is the -- you know, this is just what they were faced with,
13 they said:

14 "The settlement agreement allows for the statutes
15 maximum recovery of 500 per fax received and
16 retained, as well as a sliding scale down to 175 per
17 fax, depending on the number received, for those who
18 did not retain faxes but declare they received them."

19 MR. VINES: Uh-huh.

20 THE COURT: So those other cases that you cite are
21 district court cases outside of this circuit, whereas the
22 circuit, well, it certainly seems to be okay with the statutory
23 amount, but you haven't indicated to me that there are any
24 other cases in the Third Circuit that would suggest an amount
25 of \$43, which is very low, would be appropriate.



1 MR. VINES: Your Honor, we actually had a case in the
2 Eastern District just a couple -- two years ago. It was the
3 POWERHOME litigation; the distribution in that case was
4 ultimately about \$27, and, you know, that was approved by the
5 Court. Along the same lines as, you know, what's set forth in
6 the papers here, I think in the Landsman case, rather than
7 being an actual dollar value, it was the facts of the case in
8 that situation.

9 THE COURT: So let me just make sure I've got the
10 numbers right here. It's a \$3 million settlement. You take
11 out \$300,000 for notice, about 1 million for attorneys' fees,
12 100,000 or so for litigation expenses, and you're left with
13 about 1.6 million for distribution to 366,598 people, and you
14 calculate about a 10 percent return on that, so you get 36,660
15 potential claimants. Is that correct?

16 MR. VINES: That's correct, Your Honor.

17 THE COURT: Okay. Well -- --

18 MR. VINES: Your Honor, if I could add, also, in a
19 circumstance such as this of not knowing what the claims rate
20 would be, I also -- we noted in the papers -- the Agarilla
21 (phonetic) case where the claims rate was actually 1 percent.
22 In a circumstance such as that, applying the settlement that we
23 have in this case, the \$43 would then augment to \$430.

24 THE COURT: But you gave me that 10 percent number
25 because that was --



1 MR. VINES: That's correct.

2 THE COURT: As lawyers who handle these kind of cases
3 on a fairly regular basis, that is sort of the average
4 percentage of recovery or of claimants in these kind of cases.

5 MR. VINES: It's either the average or you might
6 speak with defendants, and they might think that it's, you
7 know, higher than average, but that is what we wanted to
8 project, you know, projecting it at 10 but hoping -- or not
9 hoping, but with understanding that it could be lower. You
10 know, whether it's at 5 percent or 8 percent, or, in the
11 Agarilla case, of 1 percent.

12 MR. LENNEN: If I may, Your Honor? I've spoken to
13 different claims administrators. I think 10 percent is on the
14 extreme high end. We're dealing with a class that goes back
15 all of the way to 2013. We're dealing with telephone numbers,
16 many times cellphone numbers, trying to find an individual,
17 especially with a common name, that still has that number and
18 tracking them down is going to lead to probably much of a
19 less-take rate.

20 I've recently spoke to a claims administrator. They
21 said 5 to 6 percent would be a high-take rate for these type of
22 cases when you're dealing with a six-year window and old
23 cellphone numbers, and they way people change telephone --
24 cellphone numbers, you can expect a much lower claim rate,
25 based on claims administrators, than probably 10 percent.



1 THE COURT: So if you go to 5 percent, say, then --
2 then your view is -- or your calculation would be everyone
3 would get about 86 bucks?

4 MR. VINES: That's correct, Your Honor.

5 MR. LENNEN: I think it's a little bit higher than
6 that, Your Honor, but --

7 THE COURT: Well, you said the 10 percent rate would
8 be 43, so --

9 MR. LENNEN: Right.

10 THE COURT: -- if you --

11 MR. LENNEN: And a 1 percent rate would be up \$430.

12 THE COURT: Yeah. But you -- if it's at 5 percent,
13 you just divide it in two -- or you multiply. You multiply 43
14 by 2, which gets you to 86, if it's a 5 percent rather than a
15 10 percent rate, correct?

16 MR. LENNEN: Yes. I guess that would be correct, Your
17 Honor.

18 THE COURT: Are you just saying that because I'm
19 saying it, or you think --

20 MR. LENNEN: Yeah. Because I haven't done the math.
21 Yes, Your Honor. I've done 1 percent and I've done percent --
22 10 percent. I haven't done the 5 percent --

23 THE COURT: Okay.

24 MR. LENNEN: -- Your Honor.

25 THE COURT: Well, so, I mean, if you look at it,



1 let's say you had negotiated 100, then per on the 10 basis and
2 the 36,660, that would have been an extra 2 million settlement.
3 If you had gone to 250, that would be probably an additional
4 8 million or so on the settlement. Is that a fairly -- fair to
5 say?

6 MR. LENNEN: It is, but, also, if I may, Your Honor?
7 I think there's a difference from the case you talked about and
8 with the facts cases. Here, we're settling on the fact as to
9 whether or not someone received an improper prerecorded
10 message, and we don't believe that happened. The messages that
11 we gave -- Verde gave were the statutorily required message.
12 We also believe that we had consents to make -- even if it was
13 the non-statutorily required message, we had consent to give
14 the message we did.

15 So I think there are more issues than the facts case
16 that we had defenses that we believed would also -- there's a
17 very strong likelihood that this class would not be certified,
18 and that the class members would walk away with zero based on
19 what we're settling on, and I think that goes to the adequacy
20 of the relief here. Clearly, as some of the courts had -- have
21 said, you know, 43 or \$86 versus no recovery is a better result
22 from this class.

23 THE COURT: But didn't I rule on a summary judgment
24 motion, and I left something in, right?

25 MR. LENNEN: You did because of the factual issues,



1 Your Honor.

2 THE COURT: Right. Right. So -- and -- so right
3 now, we're in a position of either we go to trial or I approve
4 this settlement, correct?

5 MR. LENNEN: That is correct, Your Honor.

6 THE COURT: Okay. I am not going to approve this
7 settlement. I don't think that it satisfies the adequacy
8 prong. I think that \$43 per person is just -- and even if that
9 was moved up to \$86 per person, given that there is an
10 increased concern across the country for these cellphone calls,
11 which have -- it used to be a few years ago that you did not
12 receive these kind of calls on your cellphone, and now you
13 receive them all the time, and given that there is a statutory
14 concern against these kind of calls, either cellphone or
15 landline, I just don't think that 43 is adequate.

16 And what I can do, if you would like me to, if it
17 would helpful -- help you, I will read onto the record an
18 entire opinion which will say that every other single factor
19 has been met, it's just the dollar amount that is not adequate,
20 and I'll leave that to you. If it's -- if you want me to do
21 that, I'm happy to do that, but if you don't think it will
22 actually move the ball much, I won't do it.

23 MR. VINES: I think it -- so if I could respond,
24 first, to the adequacy --

25 THE COURT: Uh-huh.



1 MR. VINES: -- issue, and then address the second
2 question that you were just asked, or the issue that you were
3 presenting, Your Honor.

4 I guess, you know, the first thing that I would point
5 to is what we set forth in our papers on page 17 and 18.
6 First, the Garrich (phonetic) court was quoting, in this case,
7 Seventh Circuit, but I think sentiments are similar in the
8 Third Circuit, is that the essential point here is that the
9 Court should not reject a settlement solely because it does not
10 provide a complete victory to the plaintiffs, for the essence
11 of settlement is compromise.

12 THE COURT: But I don't think we're talking about
13 complete. I'm not saying -- I'm not even going to willful or
14 knowing violation.

15 MR. VINES: Uh-huh.

16 THE COURT: It's just -- it's -- which would take us
17 up to the 1500. I'm just going on the 500. Complete --

18 MR. VINES: Understood.

19 THE COURT: -- recovery would be 500. We're not --
20 we're nowhere close to that number.

21 MR. VINES: Correct, Your Honor. And then I would go
22 to page 18. While Verde has agreed to settle, Verde is not
23 without significant defenses, including that Verde had the
24 requisite consent in accordance with the TCPA prior to making
25 calls to settlement class members. Specifically, what that's



1 referencing is what Mr. Lennen was just referencing, which is
2 the type of claims that we're talking about are the claims that
3 were robocalled in the event that the recipient was not able to
4 speak to a live operator.

5 Mr. Lennen and his clients contend that such a
6 robocall, at that point in the transaction, was required by the
7 TCPA and somehow in a safe harbor outside of the consent
8 requirements. We disagree with that, and that is still an
9 issue that would be a risk to be litigated if we were to go
10 forward. Continuing, Verde did not use the TCPA actual
11 artificial prerecorded voice, as well as defense's challenges
12 to the appropriateness of class certification.

13 In a nutshell, there are several issues outside of
14 where we stand at the moment and outside of the summary
15 judgment decision that Your Honor issued previously that would
16 leave many issues of fact and law to be resolved, posing risk
17 to the settlement class and to the defendant. As a result, we,
18 you know, are not in a position that we would be, you know,
19 getting the 500 or even near the 500, absent the sliding scale
20 of what a claims rate, you know, might be.

21 That, in practice, is the essence of settlement, and
22 that's why, you know, case law puts forth the idea that a
23 tangible settlement to the class now is better than a
24 speculative settlement down the road after trial, after
25 appeals, looking for a solvent defendant, and then actually



1 getting payment. Mr. Lennen's other point as to who it is that
2 we would be sending notice to is another difficulty in this
3 case. While we have the numbers that six years ago were called
4 by the company, those numbers may have changed hands.

5 The data that was available at the time that the
6 defendant made those calls was sometimes scant, incomplete. It
7 may require additional drilldown to try to find those persons.
8 That is another reason why the 10 percent, you know, is on the
9 high end. We pushed it to make it on the high end hoping that
10 -- to the extent we weren't able to connect with people, that
11 we were getting as much for the class so that when we projected
12 the \$43 and it turned out less, that number would go up, but at
13 least, you know, we would have at the 10 percent level a number
14 that is generally accepted across the country in courts for
15 TCPA class actions.

16 That's something that provides tangible, adequate
17 recovery for the class. It's not a situation of having coupons
18 or some type of, you know, pennies kind of settlement. It --
19 we wouldn't put forth a settlement like that, and we haven't in
20 this case. Instead, we've put forth a settlement that's
21 approximately \$50, which is totally in line with other cases,
22 both in this district, as well as outside of this district.

23 And as I mentioned, the POWERHOME case a couple ago
24 was another situation. That case, I believe, when we
25 originally filed it, was about \$50, but that was with a



1 5-percent claims rate, and it doubled up to 10, and as a
2 result, it cut down to about \$27, but that was still within the
3 range of reasonableness to make a fair, reasonable, and
4 adequate settlement for the class.

5 Persons who don't believe that it's fair, reasonable,
6 and adequate will be given notice. They will be given an
7 opportunity to come to this court, either in person or through
8 mail, and either object to it or opt out. If they do opt out
9 in a significant number of 5 percent or more, the settlement
10 may be terminated by the defendants and the litigation would
11 continue.

12 THE COURT: Okay. I understand. I've heard you.
13 Are -- you want more?

14 MR. LENNEN: Well, I was going to say, the other
15 issue, I think, that wasn't addressed is this only happens, the
16 class gets relief if this Court certifies the class. I think
17 that there is substantial difficulties because of the consent
18 issue alone. The only way that you can decide that is to
19 essentially listen to -- look at each consent, whether it was a
20 valid consent, because they're different; and if someone
21 revoked their consent, you're going to need to listen to
22 recordings as to whether someone or not may have revoked their
23 consent.

24 That's going to be -- need to be done, likely on an
25 individualized basis, and so if the class doesn't get



1 certified, then we're talking about the named plaintiffs
2 getting their \$500 per person, and that's all that would
3 happen. I think that what's important here is that the uphill
4 battle that we believe that plaintiff's face on having a class
5 certified from the start.

6 THE COURT: Do I have a deadline to file or assert
7 motions?

8 MR. LENNEN: You mean to give your order on this, the
9 preliminary --

10 THE COURT: To provide me with a motion to certify
11 the class. Is there a deadline for that?

12 MR. LENNEN: No, there is not.

13 THE COURT: Okay. Well, I mean, as I said, I am
14 going -- I am not going to approve this preliminary -- what is
15 -- this preliminary approval of the class action settlement, so
16 -- but I am going to set a date for class-certain motions. So
17 when would you like me to do that? When can you get briefings
18 in?

19 MR. VINES: So, Your Honor, could I ask one question
20 before we go to the deadline for setting additional briefing
21 and motion practice? Would the Court be amenable to
22 supplemental briefing on the issue of the adequacy of the --

23 THE COURT: No, I think I've heard -- I've -- you had
24 plenty of opportunity to brief it. You had plenty of
25 opportunity to argue it here. I'm not changing my mind on it.



1 So the -- your choice is to file a motion to certify, or it's
2 to go back to the negotiating table, understanding that I have
3 told you that I believe that all of the other elements have
4 been met. It's just the adequacy has not been met.

5 So it's not a complicated negotiation. Everything
6 else is there, and I've taken into account all of the other
7 issues, the risks, the various things under Rule 23, so you
8 know where I'm leaning on it. You just understand, that is not
9 an amount that I will approve in a settlement.

10 MR. VINES: And did Your Honor indicate that, an
11 amount that would be more within the Court's range of
12 reasonableness?

13 THE COURT: Well, I think I've given you some
14 calculations that might help you.

15 MR. VINES: Okay. Okay.

16 THE COURT: And certainly, if you want the
17 transcript, you can order the transcript.

18 MR. VINES: Thank you, Your Honor.

19 THE COURT: Okay. Anything else?

20 MR. LENNEN: No, Your Honor.

21 MR. VINES: Not at this time.

22 THE COURT: Okay. I gave you the opportunity of me
23 to read why I think the other elements have been met. If you
24 would like me to do that, I will do that. If you don't think
25 it would be useful, I won't.



1 MR. LENNEN: No. I think --

2 MR. VINES: I would ask that you go ahead and --

3 MR. LENNEN: No. Go ahead.

4 MR. VINES: I would ask that you go ahead and put
5 those into the record.

6 THE COURT: Okay. Have a seat.

7 The plaintiffs have submitted an unopposed motion for
8 preliminary approval of their class action settlement. The
9 plaintiffs allege that defendants violated the Telephone
10 Consumer Protection Act by making prerecorded calls. The TCPA
11 prohibits the use of an artificial or prerecorded voice in
12 making non-emergency calls to cellphones without prior express
13 consent from the recipients. The statute provides a private
14 right of action for each violation.

15 A consumer may recover \$500 in damages and up to
16 \$1,500 if a court finds that the defendant willfully or
17 knowingly violated the TCPA. On November 2015, the plaintiffs
18 filed their class action complaint. Defendants denied
19 liability in their answer and filed for summary judgment. In
20 December 2018, defendants moved for summary judgment, which
21 this Court granted in part. The parties then moved to
22 mediation.

23 Though the initial mediation was unsuccessful, the
24 parties accepted a compromise settlement in April of 2019. The
25 proposed settlement provides for defendant to pay 3 million to



1 an escrow account. The escrow funds are to be used to provide
2 notice to potential claimants up to \$300,000 to satisfy claims
3 in equal shares to all approved claimants, and to compensate
4 class counsel a third of the settlement fund and up to \$100,000
5 in litigation expenses.

6 Potential claimants are to be identified from
7 defendant's business records. The proposed settlement defines
8 the class as all individuals in the United States who received
9 a call made by or on behalf of Verde Energy USA, Inc., to the
10 individual cellular or landline telephone through the use of a
11 prerecorded or artificial voice from October 16, 2013, to
12 February 14, 2019.

13 In a connection with preliminary approval of the
14 settlement, plaintiffs request the following from the Court:

15 Preliminarily certify the settlement class for
16 purposes of the proposed settlement;

17 Preliminarily approve the settlement on the terms set
18 forth in the settlement agreement;

19 Approve the proposed form and content of the notice
20 and claim form;

21 Approve the proposed procedures for dissemination of
22 the notice in the manner set forth in the preliminary approval
23 order;

24 Appoint Angeion Group, LLC, to serve as the
25 settlement administrator;



1 Preliminarily appoint, for settlement purposes only,
2 Shanon J. Carson and Lane L. Vines of Berger Montague, PC; W.
3 Craft Hughes and Jarrett L. Ellzey of Hughes Ellzey, LLP;
4 Joshua Arisohn of Bursor & Fisher, PA; and Ari Marcus of Marcus
5 & Zelman, LLC, to serve as class counsel;

6 Establish the date of the final approval hearing, and
7 establish deadlines for the settlement class members to submit
8 the claim forms, request exclusion from the settlement class,
9 or make objections to the settlement or application for
10 attorneys' fees, reimbursement of litigation expenses, and
11 Plaintiff's services award, and for filing papers in support of
12 final approval of the settlement.

13 "The Third Circuit has recognized a strong
14 presumption in favor of voluntary settlement arguments," and
15 that's the Ehrheart case, 609 F.3d 590, pinpoint to 594:

16 "This presumption is especially strong in class
17 actions and other complex cases where substantial
18 judicial resources can be conserved by avoiding
19 formal litigation."

20 That's also the Ehrheart case quoting In re: General
21 Motors Corporation Pick-up Truck Fuel Tank Production, a
22 product liability litigation. That's 55 F.3d 768, pinpoint
23 784.

24 "However, approval is not automatic, and plaintiffs
25 must demonstrate that their settlement comports with



1 the requirements of Federal Rule of Civil Procedure
2 23(e). According to 23(e), the parties must provide
3 the Court with information sufficient to enable it to
4 determine whether to give notice of the proposal,
5 i.e., the proposed settlement to the class.

6 Specifically, the parties must prove that the Court
7 will likely be able to approve the proposal under
8 Rule 23(e) (2) and to certify the class for purposes
9 of judgment on the proposal.

10 "FRCP 23(a) establishes numerosity, commonality,
11 typicality, and adequacy of representation as
12 prerequisites for certifying a class.

13 In re: General Motors, at 796.

14 "If those requirements are met, a district court must
15 then find that the class fits within one of the three
16 categories of class actions in Rule 23(b)," that's In re:
17 Community Bank of North Virginia, 622 F.3d 275, pinpoint 291,
18 that's of the case.

19 One such category of class actions and the category
20 asserted by plaintiffs here is 23(b) (3). Under 23(b) (3):

21 "Common questions of law or fact must predominate
22 over any questions effecting only individual members
23 and the class action must be superior to other
24 available methods for fairly and effectively
25 adjudicating the controversy."



1 Here, the requirements of both 23(a) and (b) are
2 likely satisfied. Numerosity, there is no minimum number of
3 members needed for a suit to proceed to the class action, but
4 generally, if the named plaintiff demonstrates that the
5 potential number of plaintiffs exceeds 40, the first prong of
6 Rule 23(a) has been met. Here, the class is estimated at
7 366,598, so numerosity has been met.

8 With respect to commonality, commonality requires
9 common questions of law or facts to the class. Here,
10 plaintiffs assert the same claims based on the same facts for
11 all proposed class members, i.e, that the defendant engaged in
12 unlawful marketing practices by making calls to settlement
13 class members telephones through the use of a prerecorded or
14 artificial voice message without obtaining the requisite prior
15 consent in violation of the TCPA. Commonality is therefore
16 likely satisfied.

17 To satisfy typicality, the claims or defenses of the
18 representative parties must be typical of the claims or
19 defenses of the class. Here, plaintiffs allege that they
20 received the same type of unwanted calls as the potential class
21 members, therefore, typicality has likely been satisfied.

22 Turning to adequacy of representation, Rule 23(a)(4)
23 is adequacy requirement has two components designed to ensure
24 that absentee's interests are fully pursued. First, the
25 adequacy inquiry tests the qualifications of the counsel to



1 represent the class. The second component of the adequacy
2 inquiry seeks to uncover conflicts of interest between named
3 parties and the class they seek to represent. Here, no issue
4 has been raised concerning counsel, neither to there appear to
5 be conflicts between plaintiffs and the potential class.

6 The plaintiffs and the potential class allegedly
7 suffered the same harms, and while the proposed settlement
8 provides distribution of the settlement funds based on the
9 number of claims made, it also provides for a comprehensive
10 notice to the potential claimants. There do not appear to be
11 adequacy issues.

12 Turning to predominance. Predominance measures
13 whether the class is sufficiently cohesive to warrant
14 certification. Here, all potential class members were subject
15 to Defendants alleged, unauthorized, automated calls, and the
16 plaintiff do not raise any claims unique to themselves,
17 therefore, predominance is likely satisfied.

18 With respect to ascertainability, in addition for
19 23(b)(3) classes, the class must be currently and readily
20 ascertainable based on objective criteria. Here, plaintiffs
21 have access to business records detailing who received the
22 unwanted calls and when, so the potential class is
23 ascertainable.

24 I do have some concerns having heard what I've heard
25 today from defendant that there will be some difficulty finding



1 the numbers and associating those telephone numbers with
2 individuals, but I assume that what was stated in the briefs,
3 which is, these folks are ascertainable, is, in fact, the case,
4 and will therefore find that that prong is likely satisfied.

5 Superiority requires a class action to be superior to
6 other means of adjudication. Though the TCPA does provide a
7 private right of action, courts in this circuit have determined
8 that class actions are superior to individual actions in the
9 TCPA context. As the Court explained in AL Industries, Inc.
10 versus P. Tripolini, Inc. (phonetic), Rule 23(b)(3) itself
11 defines superiority in terms of efficiency, and a class action
12 is more efficient than processing hundreds of thousands of
13 individual claims.

14 Furthermore, the Third Circuit has suggested that
15 TCPA class actions have an equal, if not greater, deterrent
16 effect on potential TCPA violators that individual suits, in
17 addition to the benefit provided by efficiency, and that is the
18 Landsman case, 640 F.3d 72, pinpoint 95, Third Circuit 2011.
19 Here, a class action is likely the superior method of
20 adjudicating claims because of the hundreds of thousands of
21 violations at issue.

22 Once the appropriateness of a class action has been
23 established, the court should consider the rest of the factors
24 outlined in 23(e), namely, if the proposal would bind the class
25 members, the court may approve it only after a hearing and only



1 on finding that it is fair, reasonable, and adequate after
2 considering whether the class representatives and class counsel
3 have adequately represented the class, B, the proposal was
4 negotiated at arm's length, C, the relief provided for the
5 class is adequate, taking into account the costs, risks, and
6 delay of trial and appeal.

7 The effectiveness of any proposed method of
8 distributing relief to the class, including the method of
9 processing class member claims. The terms of any proposed
10 award of any attorneys' fees, including timing of payment and
11 any agreement required to be identified under Rule 23(e)(3),
12 and, finally, the proposal treats class members equitably
13 relative to each other.

14 To aid in this determination, the parties seeking
15 approval must file a statement identifying any agreement made
16 in connection with the proposal. Furthermore, the Third
17 Circuit has articulated the following non-exclusive list of
18 factors for courts to consider when determining an adequacy of
19 settlement:

20 The complexity, expense, and likely duration of the
21 litigation;

22 The reaction of the class to the settlement;

23 The stage of the proceedings and the amount of
24 discovery completed;

25 The risks of establishing liability;



1 The risks of establishing damages;
2 The risks of maintaining the class action through the
3 trial;
4 The ability of the defendants to withstand a greater
5 judgment;
6 The range of reasonableness of the settlement fund in
7 light of the best possible recovery;
8 The range of reasonableness of the settlement funds
9 to a possible recovery in light of all the attendant risks of
10 litigation.

11 Here, there are no allegations that class counsel has
12 been adequate, and it appears to me that they are. The
13 proposed settlement was negotiated at arm's length with a
14 mediator, and the proposed class members are to be treated
15 equitably in that the settlement funds are to be distributed in
16 equal shares. The -- there has been on information submitted
17 to me with respect to the ability of the defendants to
18 withstand a greater judgment, in fact, I find no specific
19 information about how -- whether this settlement would impact
20 or how it would impact on their bottom line.

21 I turn to the amount of the recovery. According to
22 the plaintiffs, the projected recovery per claimant is
23 comparable to that in other TCPA cases, and they cite a
24 Northern District of Illinois case which collects other cases,
25 but other TCPA cases in this circuit appear to have provided



1 greater relief. In Landsman, for example, the settlement
2 agreement allows for the statutory maximum recovery of \$500 per
3 fax received and retained, as well as a sliding scale down to
4 \$175 per fax, depending on the number received, for those who
5 did not retain faxes but declare that they received them.

6 In this case, if I look at the amount, although the
7 amount of the settlement is \$3 million, 300,000 or so is taken
8 out for notice, \$1 million is taken out for attorneys' fees,
9 about \$100,000 is taken out for litigation expenses, which
10 leaves for the class \$1.6 million. Although there are the
11 calculation that there 366,598 potential class members, the
12 parties agree that 10 percent as high number are likely to be
13 claimants, which takes us down to 36,660.

14 By that calculation, each member of the class would
15 get \$43. When I compare this to the \$500 that is receivable
16 under the statute, not taking into account the 1,500 which
17 would be if there was a willing and knowing violation, that
18 number is a far cry from the \$500. Now, while obviously there
19 are risks associated with litigating this case further, the
20 Court is not a rubberstamp, and simply because there is a
21 settlement does not mean that the Court should automatically
22 approve the settlement.

23 In looking at the numbers, I just -- I did some
24 back-of-the-envelope calculations. If each of the 36,660
25 potential claimants were to receive \$100, that would be an



1 increase in \$2 million. At the top end of that, if they were
2 to -- at the top end of my calculations, if they were to
3 receive 250, that would be \$9,165,000, which would be at the
4 high end of a \$7 million increase in the settlement.

5 Those numbers I just throw out there simply because I
6 have calculated them, but certainly the range is something that
7 should be considered in reaching a settlement in this case, and
8 I'm not suggesting that the high end of the range or the low
9 end of the range is appropriate. I'm just saying that that
10 range is something that I, given the facts of this case, would
11 be more interested in approving than the current rate of --
12 which would give \$43 per person on the numbers provided to me.

13 Accordingly, I will deny the motion. I do note that
14 in the proposed order for final approval of the settlement,
15 plaintiffs state that the Court shall retain jurisdiction over
16 the administration of the settlement. That's not something I
17 normally do, but in a class-action context, it may be
18 appropriate, but that is something that, if that is what you
19 would like me to do, you have to argue for it in any subsequent
20 motion.

21 So with that, I think the next phase is I should set
22 a deadline, given that discovery is over and summary judgment
23 has been decided, I should set a date for a motion for class
24 certification. So what would be -- and I'm open to the parties
25 telling when they think a good date for that would be.



1 MR. VINES: So, Your Honor, just to address a couple
2 of the issues, there -- the first one, we, the parties, reached
3 this settlement during the course of discovery. I would like
4 to at least reserve the right -- or at least the right to
5 request additional discovery if this case is going to proceed
6 forward.

7 THE COURT: Well, wait a minute. Is fact discovery
8 over, according to the deadlines, the scheduling order?

9 MR. VINES: According to the scheduling order, yes.

10 THE COURT: Well, then, there is no more discovery.

11 MR. VINES: Okay. As far as the -- setting the
12 deadline for the class certification, I would at least request
13 two things. One, I'd like to get the transcript so that we
14 could review that.

15 THE COURT: Why would that impact on the deadline?

16 MR. VINES: Because Your Honor just made --

17 THE COURT: Ah, okay.

18 MR. VINES: -- a ruling regarding --

19 THE COURT: So you want at least the length of time
20 it would get you to the -- it would get you the transcript plus
21 some?

22 MR. VINES: Yes, Your Honor.

23 THE COURT: Mr. Malave, when -- how long does it take
24 to get a transcript of the ESR?

25 THE CLERK: Typically, there's the 30-day turnaround,



1 a week to 7-day turnaround?

2 THE COURT: Well, no. We'll give them 30 days. We
3 won't put an express deadline on that.

4 Okay. So we're starting off with 30 days --

5 MR. VINES: Okay.

6 THE COURT: -- and then we're adding from there.

7 MR. VINES: I would ask for 60 days to prepare the
8 class certification.

9 THE COURT: Okay.

10 And that's okay with you?

11 MR. LENNEN: For them to prepare their class cert
12 motion?

13 THE COURT: Yeah.

14 MR. LENNEN: Yes, Your Honor. That's --

15 THE COURT: Okay. So that's 90 days from today, and
16 I'll issue an order. And how long would you like to respond?

17 MR. LENNEN: 90 days, Your Honor.

18 THE COURT: 90 days?

19 MR. LENNEN: Yes.

20 THE COURT: And would you like a reply?

21 MR. VINES: Yes, we would, Your Honor.

22 THE COURT: How long would -- you're not getting 90
23 days for a reply, so give me another different -- another
24 number.

25 MR. VINES: Could we have 30 days, Your Honor?



1 THE COURT: You can have 30 days.

2 Okay. I will issue orders on the motion and, also, a
3 scheduling order, and we'll take it from there.

4 MR. VINES: Okay. Your Honor, could I just make a --
5 get a clarification? As to what Your Honor read into the
6 record just a few moments ago, I'm just trying to understand,
7 are those findings of the Court? Is that a preliminary ruling
8 on class certification?

9 THE COURT: No. With respect to the numbers, those
10 are not findings of the Court and they're not a preliminary
11 ruling. The numbers, right?

12 MR. VINES: Oh, no. No.

13 THE COURT: The numbers I provided you are not --

14 MR. VINES: No.

15 THE COURT: -- a decision of the Court, and they are
16 not in -- they're just by way of providing you with guidance.

17 MR. VINES: Understood.

18 THE COURT: With respect to everything I read --

19 MR. VINES: Yes.

20 THE COURT: -- before then, that is an opinion on the
21 motion. It is an oral opinion from the bench on the motion.
22 So those are the -- as if I had written it and had signed it,
23 that is the opinion. It's -- it will -- it is now -- rather
24 than being something that I will file on ECF, the transcript
25 will be on ECF, and that is -- that will be the opinion.



1 MR. VINES: So --

2 THE COURT: In other words, if you appeal it, you
3 look to the opinion in the transcript.

4 MR. VINES: Actually, Your Honor, I was looking to it
5 more in the sense of understanding how much reliance to place
6 on it in connection with a motion for class certification.

7 THE COURT: You can place reliance on it.

8 MR. VINES: Thank you, Your Honor.

9 MR. LENNEN: But, Your Honor, this was done for the
10 purpose of the settlement. I assume that now that this
11 settlement is not going to go forward, they -- it's not
12 something they can rely upon for class cert, because this was
13 all done under the veil of a settlement for settlement purposes
14 only --

15 THE COURT: So I presume he's going to argue that
16 because I've made it -- made those findings in this preliminary
17 approval that they should apply in the broader context, and
18 you're going to argue no.

19 MR. LENNEN: Correct.

20 THE COURT: And he's going to have to justify why he
21 is relying on -- why he thinks its appropriate to rely on the
22 findings and the motion for a preliminary approval of
23 settlement, and you're going to argue why it is not
24 appropriate. So it's just another battle that you have to
25 have, but this is an opinion. It's -- and it's -- you have to



1 take it in the context of the motion. So obviously there will
2 be arguments on both sides as to the weight of the findings in
3 this particular opinion on this particular motion.

4 MR. LENNEN: You're saying contested motion.

5 THE COURT: This uncontested motion, right. Right.

6 MR. LENNEN: Thank you.

7 THE COURT: So I'm -- I expect that you will be
8 arguing that vigorously.

9 MR. LENNEN: Thank you.

10 THE COURT: Okay?

11 MR. LENNEN: Yes.

12 THE COURT: Anything else?

13 MR. VINES: No, Your Honor.

14 THE COURT: Thank you.

15 MR. VINES: Thank you, Your Honor.

16 THE CLERK: All rise.

17 (Proceedings concluded at 4:43 p.m.)

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C E R T I F I C A T I O N

I, J. Marie Moran, court-approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter, and to the best of my ability.

/s/ J. Marie Moran

J. MARIE MORAN, AAERT NO. 677 DATE: October 3, 2019
ACCESS TRANSCRIPTS, LLC

C E R T I F I C A T I O N

I, Lisa Luciano, court-approved transcriber, hereby
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter, and to the best of my ability.

Lisa Luciano

LISA LUCIANO, AAERT NO. 327 DATE: October 3, 2019
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